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In The

# Supreme Court of the United States

October Term, 1993

THE BOARD OF GOVERNORS OF REGISTERED DENTISTS OF THE STATE OF OKLAHOMA,

*Petitioner,*

*vs.*

LOIS JACOBS, D.D.S.,

*Respondent.*

*On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma*

## RESPONDENT'S BRIEF IN OPPOSITION

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18 pp

## QUESTIONS PRESENTED

1. Whether the Oklahoma Board of Governors of Registered Dentists may prohibit a general dentist from stating in an advertisement the services she is legally permitted to perform?

2. Whether the Oklahoma Board of Governors of Registered Dentists may prohibit a general dentist from accurately and truthfully stating in an advertisement that she is an "Advanced University & Hospital Trained Specialist in Anesthesiology"?

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## RESPONDENT'S BRIEF IN OPPOSITION

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Article 2, § 22 of the Constitution of the State of Oklahoma provides:

> Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

The Oklahoma Dental Act, 59 Okla. Stat. §§ 328.1-328.52 (Okla. Stat. Ann., West 1989), provides in pertinent part at Section 328.32 the following:[1]

> The Board of Governors shall have power, after a hearing for any causes now existing in the laws of the State of Oklahoma, or for a violation of any acts prohibited herein, to revoke a license of a dentist to practice dentistry, or a specialist license of a dentist, or to suspend the use of the same, or to discipline by probation or reprimand, public or private . . . upon the following grounds:
>
> (g) Has been guilty of dishonorable or unprofessional conduct;
>
> (i) Holds himself out as especially qualified in or limiting his practice to a branch of dentistry without a special license therefor;

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1. The full text of 59 Okla. Stat. § 328.32 is set out in Petitioner's Appendix F, A39-A45.

## STATEMENT OF THE CASE

This case arises out of an advertisement for professional services in dentistry that Dr. Lois Jacobs, D.D.S., placed in the yellow pages of the Tulsa, Oklahoma, Southwestern Bell Telephone Directory. Dr. Jacobs first placed the ad in the telephone directory in 1986 when she left academic dentistry and medicine to enter competitive private practice in Tulsa, Oklahoma. She has renewed the ad each year.

Dr. Jacobs' ad is listed under the heading of "general dentists" and conveys to the public the nature of her fully lawful practice and specifically what she has done to qualify in her field. The words used in the ad at issue are "Dentist Anesthesiologist" which appear at the top of the ad, and "Advanced University & Hospital Trained Specialist in Anesthesiology" which appear at the bottom of the ad. (P. App. E at 21, no. 6).

### A. Dr. Jacobs' Professional Credentials Are Above Reproach.

Due in part to Dr. Jacobs' exceptional training and unique dental practice, the facts of this case are complex. When the case commenced, Dr. Jacobs was the only dentist in the State of Oklahoma who, upon completion of dental college, entered and successfully completed a two-year medical residency in anesthesia at the University of Iowa Hospitals and Clinics for which she, along with the M.D. candidates, received advanced certification in anesthesia.

The University of Iowa medical residency program in anesthesia is accredited by numerous authorities, including the Council for Graduate Medical Education, the American Board of Medical Specialties, and the American College of Anesthesiology. The training is recognized throughout the world as qualifying medical practitioners as specialists in anesthesia. (Board Hearing Transcript 113-115: Tes. of J. Chancellor, M.D.).

Dr. Jacobs is a member and officer of the American Society of Dentists Anesthesiologists, a national organization composed of dentists who have two or more years of accredited post-graduate specialty education in anesthesiology. The members of this organization are recognized by state agencies, federal agencies, state dental societies and national insurance carriers as a highly qualified group of dentists with special training and expertise in anesthesiology, (Board Hearing Transcript 154-159: Tes. of J. Snyder, D.D.S., Dentist Anesthesiologist, Alexandria, Va.).

Dr. Jacobs is also a Fellow in General Anesthesia of the American Dental Society of Anesthesiology (ADSA). The Oklahoma Dental Board explicitly recognizes in its Rules and Regulations that such "fellows" have special training and experience in the use of anesthesia in dentistry. (Record at 237; Rule IV(4)B3 of Rules and Regs. for Dentists, Feb. 1988).

From 1981 to 1985 Dr. Jacobs held joint teaching appointments in the College of Dentistry and the College of Medicine at Oral Roberts University (ORU), and served as the University's Director of Dental Anesthesiology. The Dental School and the Medical School at ORU were fully accredited by state and national accrediting commissions.

Upon leaving academic medicine and dentistry in 1986, when ORU closed both its College of Dentistry and its College of Medicine, Dr. Jacobs entered private competitive practice in dentistry and placed the advertisement in the telephone directory.

Because of her special training and expertise in anesthesia, Dr. Jacobs limits her dental practice to providing anesthesia services for dentistry. Her practice consists of going to another dentist's office where she administers anesthesia and monitors a dental patient while the other dentist performs the necessary dental procedures. The service she provides allows a patient to have

procedures performed safely by their own dentist that otherwise would have to be done in a hospital or in an oral surgeon's office. According to the testimony of experts, the health and welfare of patients is best served by having two clinicians in attendance when anesthesia is required for a patient. (Board Hearing Transcript: Testimony of J. Chancellor, M.D. at 120, Testimony of J. Snyder, D.D.S. at 156).

**B. Dr. Jacobs' Dental Practice Is Fully Authorized By The State.**

Dr. Jacobs does not hold a "specialty license" in dentist anesthesiology because one does not exist. Under Section 328.22 of The State Dental Act, 59 Okla. Stat. §§ 328.1-328.52, the Dental Board recognizes and issues specialty licenses only in areas "approved by the Council on Dental Education of the American Dental Association."[2] Although The American Dental Association (ADA) recognizes eight (8) fields of specialty in dentistry, Oklahoma recognizes only seven (7). (Rule VI of Rules and Regs. for Dentists; P. App. E at A27, no. 5). Those areas eligible for specialty licenses in Oklahoma are oral and maxillofacial surgery, orthodontics, pedodontics, periodontics, prosthodontics, endodontics, and oral pathology. (The ADA also recognizes public health as a dental specialty). When the Oklahoma Dental Board grants a specialty license, the practitioner must limit his or her practice to that one field and may only advertise in the classified section of a telephone directory under that specialty. 59 Okla. Stat. § 328.28A(2). However, a general dentist may perform dental services in any field of dentistry, and may advertise in the yellow pages those services as long as the ad is listed under "general dentists" and not under a specialty.

The anesthesiology services that Dr. Jacobs provides, and

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2. The text of 59 Okla. Stat. § 328.22 appears in Petitioner's Appendix F, A36-A39.

which she advertises under "general dentists," are fully authorized by the state. She holds all the special licenses, certificates and permits required and issued by the Dental Board or the state to engage in this practice. Her Oklahoma dental license No. 4184 was first issued in 1980 and renewed each year thereafter. She also holds general anesthesia permit No. 45 and conscious sedation permit No. 5. (P. App. E at 18-19, no. 1 and 2). These permits and license are all issued by the Dental Board and have never been revoked, suspended, or the subject of any disciplinary proceeding prior to this action.

**C. The State Dental Board Action.**

In May of 1991, solely upon a complaint received from a Tulsa dentist, the Dental Board brought formal charges against Dr. Jacobs for her advertisement. (P. App. E at 19, no. 3). The formal complaint, Case No. 91-017, contained only the following specific allegations:

> 1. Jacobs has announced and held herself out to the public as limiting her practice or as being especially qualified as a specialist in Anesthesiology including a certain advertisement placed in the Southwestern Bell Yellow pages in and for the City of Tulsa, Tulsa County, Oklahoma.
>
> 2. That Jacobs has not obtained a license pursuant to 59 O.S. § 328.22 from the Board of Governors to allow her to hold herself out to the public as being specially qualified as a specialist in Anesthesiology.
>
> 3. That neither the Board of Governors nor the Council on Dental Education of the American Dental Association either recognize a specialty

or approve a specialty of anesthesiology for Dentists.

4. That the acts and actions of the Respondent set forth in paragraphs 1 through 3 constitute dishonorable or unprofessional conduct and are therefore a violation of 59 O.S. § 328.32(g).

5. That the acts and actions of the Respondent set forth in paragraphs 1 through 3 constitute holding herself out as especially qualified in or limiting her practice to a branch of dentistry without a special license are, therefore, a violation of 59 O.S. § 328.32(i).

At the conclusion of the Dental Board proceedings, the Dental Board found Dr. Jacobs, because of her ad, guilty of two violations of the State Dental Act: Namely, § 328.32(i) — Holds himself out as especially qualified in or limiting his practice to a branch of dentistry without a special license therefor; and, by reason of such "holding out," also guilty of violating § 328.32(g) — Has been guilty of unprofessional conduct. (Board Hearing Transcript 242-245). The Dental Board ordered that Dr. Jacobs be disciplined by (1) a written reprimand be placed in her professional public file, and (2) Dr. Jacobs' dental license be placed on probation for a period of two years. In addition, the Dental Board sent a report concerning this action against Dr. Jacobs to the National Practitioner Data Bank stating that Dr. Jacobs had engaged in "false, fictitious, and misleading advertisement."3

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3. Dr. Jacobs was neither charged nor found in violation of Sec. 328.32(d) of Okla. title 59 which provides — "Has been guilty of false, fraudulent or misleading advertising, as herein probibited." (Text of 59 Okla. Stat. § 328.32 appears at Petitioner's Appendix F, A39-A45).

Pursuant to Title 59 Okla. Stat. § 328.43 of the Oklahoma Dental Act and section 318 *et seq.* of the Oklahoma Administrative Procedures Act, 75 Okla. Stat. §§ 301-325, Dr. Jacobs filed a timely appeal to the Tulsa County District Court. (D.C. No. CJ-91-5201). The District Court after reviewing the record, being fully briefed, and hearing oral arguments, reversed the decision of the Dental Board, ordered the record expunged, including the report to the National Practitioners Data Bank, and fully restored all Dr. Jacobs' professional rights.

The trial court found Dr. Jacobs' ad to be commercial speech protected by the First Amendment to the United States Constitution and the Oklahoma Constitution. (Record at 381-384; P. App. D, A12-A16).

Upon appeal, the Oklahoma Court of Appeals, Division 4, affirmed the Tulsa County District Court in an unpublished memorandum opinion dated August 10, 1993. (Case No. 79,315; P. App. B, A2-A10). The Dental Board's Petition for Rehearing was denied on September 10, 1993. (P. App. C at A11). And, on November 23, 1993, the Dental Board's Petition for a Writ of Certiorari in the Supreme Court of Oklahoma was denied. (P. App. A at A1).

## REASONS FOR DENYING THE WRIT

The decision of the Oklahoma Court is correct and follows the applicable decisions of this Court. There are no new, special, or important issues raised in this case warranting Supreme Court review. Additionally, the Oklahoma trial court's decision was based upon substantial issues of state law as well as the federal law.

Dr. Jacobs' advertisement contains truthful statements describing a lawful professional dental practice. The facts stated in the ad, which relay to the public what she has done to qualify

herself to engage in her dental practice, are readily verifiable. To suggest that a certificate of medical residency from a state university medical school is not a bona fide document is without merit.

Dr. Jacobs would also advise the Court that in January 1994, the Council on Dental Education of the American Dental Association (ADA) recommended that the application of the American Society of Dentists Anesthesiologists (ASDA) for the creation and recognition of a dental specialty in dental anesthesiology be approved by the 1994 ADA House of Delegates. Favorable action by the ADA House of Delegates is expected in October of this year. Such action may render the issue of "specialist" in this particular case moot.

## I.

## THE RULING IN THIS CASE IS FULLY IN ACCORD WITH DECISIONS OF THE UNITED STATES SUPREME COURT CONCERNING GOVERNMENT REGULATION OF COMMERCIAL SPEECH.

In a 1990 commercial speech case dealing with the right of professionals to advertise, this Court determined that an Illinois attorney had a First Amendment right to place upon his letterhead that he was certified as a specialist by a private professional organization. *Peel v. Attorney Disciplinary Com.*, 496 U.S. 91 (1990). This Court held that a state rule which completely prohibited such advertising and provided censure for violation of the rule was overbroad.

In *Peel*, this Court found that the attorney was engaged in a lawful activity, that his certification by the National Board of Trial Advocacy (NBTA) was true and verifiable, and that the NBTA was a bona fide organization with "objective and consistently applied

standards relevant to practice in a particular area of the law." *Id.* at 109.

Like *Peel,* Dr. Jacobs is engaged in a lawful practice. She is authorized by the Dental Board to practice dentistry and to provide anesthesia service in dentistry. While Dr. Jacobs does not hold a "specialty" license in dental anesthesia because there is none, she does hold all the special licenses, certificates, and permits that the State of Oklahoma issues or requires. Furthermore, the Dental Board explicitly recognizes that Dr. Jacobs, as a Fellow in General Anesthesia of the ADSA, is especially qualified in the field of anesthesia by reason of substantial post graduate training.

Dr. Jacobs' ad does not use the term "specialist" in an unqualified manner. The term is modified by "Advanced University & Hospital Trained [Specialist] in Anesthesiology." Her anesthesia medical residency certificate, from a program conducted by the University of Iowa College of Medicine and approved by the American Board of Medical Specialists, is on file with the Dental Board. Any consumer or member of the public desiring verification of Dr. Jacobs' training can do so easily. Her statements tell the public what service she offers and what she has done to qualify herself in her field of practice. The statements are of objective facts.

This Court has also recognized that information of the kind in Dr. Jacobs' ad may be of significant value to society. In *Bates v. State Bar of Arizona,* 433 U.S. 350, at 364 (1977), this Court stated:

> The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. . . . Advertising, though entirely commercial, may often carry information of import to significant issues of the day.

## II.

## THE RULING IN THIS CASE IS FULLY IN ACCORD WITH OTHER DECISIONS OF THE OKLAHOMA COURTS.

The Dental Board cites *Steelman v. Oklahoma State Board of Medical Licensure and Supervision,* 824 P.2d 1142 (Okla. App. 1992), as an inconsistent decision. This alleged conflict can be distinguished upon the facts.

In *Steelman,* an Oklahoma physician who attended a three day seminar in "bariatric" medicine sought permission to hold himself out as board certified by the American Board of Bariatric Medicine. The Rules of the Oklahoma Board of Medical Licensure provide that physicians may claim to be board certified only if they have completed the requirements for certification by a member board of the organization of American Board of Medical Specialties or by an organization found by the board to be equivalent. The Medical Licensure Board concluded that the American Board of Bariatric Medicine was not a member board of ABMS and that the three day training course was not equivalent training.

The Oklahoma Court of Appeals upheld the Medical Board's decision. The court found as follows:

> . . . while Steelman is entitled to commercial free speech, the right is not absolute. The Board, as an arm of the State seeking to protect the public's health and safety may make reasonable restrictions on Steelman's right to advertise himself as "board certified". He may not so advertise himself, when he has not met

> the reasonable requirements set by the Board to do so.

*Id.* at 1144-1145.

Unlike the physician in *Steelman* whose credentials consisted of attending a three day seminar, Dr. Jacobs was trained in a two-year program certified by the American Board of Medical Specialties. If the physician in *Steelman* had presented Dr. Jacobs' credentials, he would have prevailed.

In addition, the Dental Board explicitly recognizes that because Dr. Jacobs is a Fellow in General Anesthesia of the American Dental Society of Anesthesiology she has special training and experience in the use of anesthesia in dentistry. Dr. Jacobs clearly meets the requirements of *Steelman*. The decisions in these cases are not in conflict.

## III.

## THE RULING IN THIS CASE IS FULLY IN ACCORD WITH DECISIONS OF OTHER LOWER COURTS.

The Petitioner asks this Court for Certiorari because of an alleged conflict between the decision in the case at bar and *Parmley v. Missouri Dental Board,* 719 S.W. 2d 745 (Mo. banc. 1986). The facts in this instant case are quite different from those in *Parmley.* The dentist in *Parmley* was seeking a specialty license in pedodontics, one of the eight dentistry specialties, without having to take and pass the required examination and without having met the educational requirements.

Dr. Jacobs is in an entirely different position. She has the highest credentials and certification that can be obtained in her field — no dentist in Oklahoma has more formal education in

anesthesiology. And, Dr. Jacobs has not been turned down for a specialty license. There is no dentistry specialty license in anesthesiology for which she could apply.

In the event there is a conflict between the *Parmley* decision and this Court's decision in *Peel,* then this Court's decision in *Peel,* decided two years later, would take precedence.

## CONCLUSION

Based upon all of the foregoing reasons, Respondent prays that the Court deny the Oklahoma Dental Board's Petition for Writ of Certiorari. Dr. Jacobs respectfully submits that the opinion below was correct and proper and should not be disturbed.

Respectfully submitted,

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